

**PRESENTATION TO THE ASSOCIATION OF CONFLICT  
RESOLUTION/ENVIRONMENTAL AND PUBLIC POLICY SECTION CONFERENCE:  
SEEKING SUSTAINABILITY THROUGH COLLABORATIVE GOVERNANCE**

**JUNE 28 – 30, 2011 IN PORTLAND, OREGON**

Opening Plenary: "Is it Time to Move the Field in a New Direction?"

For more than 30 years, the field of environmental dispute resolution (or public policy dispute resolution) has operated on three premises: (1) government (federal, state and local) will eventually **mandate** mediation and other forms of collaborative problem-solving and that these will come to **dominate** the ways in which administrative actions of government are handled; (2) if we can create a sufficient **supply** of qualified mediators, supply will drive the demand for our services; and (3) (highly visible) **successes** will make the case for our services and demonstrate the value-added when professional neutrals are involved.

**Getting government to mandate the use of our services:**

In the beginning there was ACUS – the Administrative Conference of the United States. It doesn't exist anymore, but for a period, Assistant Secretary-level appointees from all the federal agencies plus more than a dozen Presidential appointees tried to find ways of enhancing the effective operation of government. They (with help from Phil Harter) pushed for **negotiated rule-making**. EPA and other agencies experimented with the idea and eventually convinced Congress to pass the Administrative Dispute Resolution Act in the early 1990s.

We were sure that subsequent efforts to draft complicated regulations (and avoid the delay of litigation) would involve negotiated rulemaking assisted by trained mediators listed on the roster prepared by the US Institute for Environmental Conflict Resolution. We were also convinced that negotiated rule-making would convince federal agencies to use professional neutrals in a broad range of policy-making and administrative activities. While EPA's negotiated rulemaking efforts have grown, the broader shifts we had hoped for, did not occur.

With help from a foundation created especially to advance public dispute resolution, we created State Offices of Mediation in almost two dozen states. We thought that once the Governors acknowledged how valuable mediators could be to the resolution of complex public policy disputes, states would create rosters of qualified neutrals and use them to handle all kinds of public disputes. We helped states like Connecticut, Montana, and Maine adopt statutes

encouraging the use of mediation in all kinds of local land use disputes. In a number of states, we tried writing into standard state zoning enabling acts provisions for the use of mediation to resolve difficult land use disputes.

I think these were all worthwhile efforts, and they did legitimize environmental and public policy dispute resolution, but they didn't create the widespread demand for our services that we anticipated.

### **Building the Supply of Qualified Neutrals**

We went along with efforts in a great many states to implement 40-hour "courses" aimed at ensuring consumers and public agencies that professional neutrals are, indeed, qualified. [Although these were never specifically geared to testing the ability of public and environmental dispute resolvers in particular.]

We worked with USIECR and state courts to create rosters that would ensure public agencies that they could have immediate access to a cadre of qualified neutrals with appropriate background and training. The growth of public dispute resolution efforts never took off in the way we imagined it might (even though the state offices in California and a few other places are going strong).

We started to offer training – a staple of a great many dispute resolution companies – to build the supply of "qualified mediators." We worked first through SPIDR, then ACR and with the Special Committee of the ABA to ensure that short workshops are available a few times a year to public and environmental dispute resolvers.

We teach negotiation and dispute resolution to planners and other public policy degree candidates at schools like Portland State and MIT. In fact, most urban planning departments offer at least one course on negotiation and dispute resolution. We thought this would create an "informed demand" on the part of future public agency staff for our services. Unfortunately, that has not happened.

### **Publicize Our Successes**

We wrote articles and books, organized data bases to store carefully documented case studies, initiated statistical analyses, and contributed newsletters and newspaper pieces highlighting our

success stories. The bibliography is lengthy, but the strategy of publicizing our successes didn't work as planned to generate widespread demand for our services.

We've built web pages, given presentations, and spoken at, I dare say, hundreds, if not thousands of conferences. We've given talks to thousands of public officials, community activists, business leaders and other influential -- all on the premise that once we shared our successes, the floodgates would open. Unfortunately, that has not happened.

### **Let's take stock.**

I'm glad we did all these things. I think all three premises were reasonable. But, they haven't worked to build the field at the pace that many of the early practitioners hoped.

We haven't seen a dramatic increase in the number of environmental and public dispute resolution firms. The same fifteen or so firms and twenty or so solo providers are still getting the lion's share of the work. I know that the number of names on the USIECR has grown, but overall, the size of the field has remained relatively stable.

I did a survey a few years back that was published in **Negotiation Journal**. At that time, public and environmental dispute resolution was a \$30 - \$50 million or more a year industry in the United States (depending on what was counted). By now, it ought to be at least two or three times that large if our three strategies had worked.

If just 10 federal agencies were spending at least \$3 million a year on dispute resolution contracts of all kinds, 50 states were sending an average of \$1 million a year and the 140 large cities in the United States were each spending \$250,000 a year, that would account for well over \$100 million in contracts.

### **Time for a shift in strategy**

*Those of us who have been in leadership roles for several decades (as the heads of for-profit and not-for-profit companies providing dispute resolution services in the public sector, federal and state office staff, trainers and teachers, and ACR committee members) – and you know who you are -- probably need to step aside. I'm not saying we shouldn't continue to be active, but we should let the next generation of EPP leaders step up.*

I think we have played out the string on our three-pronged strategy. It is time for new leadership to pursue a more entrepreneurial approach to growing the field. Here are four ideas that some of

the younger (by which I mean under 40!) public and environmental dispute resolution professionals in the crowd might want to jump on. It's my sense that the next generation will be more comfortable with the shifts in strategy I am proposing.

- 1. We've got to pay more attention to the idea of private sector clients paying for neutral services.***
- 2. We've got to try harder to get neutral services written into the general funds budget of every public agency in the same way that money to cover lawyers and legal charges are financed.***
- 3. We should play up the mystery of mediation (rather than trying to de-emphasize the specialized skills involved) and play up the importance of "advanced certification."***
- 4. We have to commit a lot more money and time to "marketing the field." This means distinguishing neutral services from other kinds of public engagement consulting, and then learning how to sell both.***

#### **Private sector clients paying for neutral services**

Those of us of a certain age are still squeamish about working for private or corporate clients. But, if we can be neutral and be paid by government, we can be neutral and be paid by private clients. As more and more infrastructure and development is financed (and managed) by private capital, we've got to be willing to facilitate the stakeholder engagement processes that these development proponents are already committed to financing.

Stakeholder engagement – a branch of corporate social responsibility – ought to be the source of more than half of the funds used to underwrite neutral services in the United States. And, I am, in fact, talking about neutral services and not just public engagement consulting. Our neutrality is what the private sector is most willing to pay for.

By moving the funds allocated by one "side" to support a multiparty stakeholder committee, we can blunt the charge that we are working for the funder. We can serve as neutrals and work for all the participants in complex multi-party, multi-issue dispute resolution efforts. Even if the

money to pay us originates from one source, once it is transferred to a fund or an executive committee managed jointly by all the parties, we can work for “the process,” not for the funder.

Instead of trying to convince regulators to hire us, we should shift at least some of our attention to proponents of any and all new development. They are the ones with the primary interest in making sure we can use our neutral standing to produce a meaningful consensus.

### **Get written into the legal services budget of every public and not-for-profit agency**

How many of you know what IOLTA stands for? Interest on Lawyers Trust Accounts. Lawyers who receive interest on funds they are holding from or for their clients, must keep these accounts separate. That interest is used to support not-for-profit legal aid providers. This comes to more than \$130 million a year. Between 1991 and 2003, IOLTA funds totaled more than \$1.5 billion.

### **What if there were an analogous set-aside to support environmental and public dispute resolution efforts?**

Courts could require all environmental penalties to go into a national (or a state) trust fund to support environmental dispute resolution. There is a great precedent for this. In Virginia many years ago the court mandated that the penalties in the Kepone case be used to support an environmental improvement fund in Virginia. These funds have been used to support public dispute resolution efforts.

There might be a requirement that some small percentage of all funds appropriated to support public infrastructure be set aside to support a dispute resolution trust fund.

A tiny fraction of the interest on all administrative (i.e. licensing or permitting) fees collected by federal, state and local agencies could be directed to such a fund. We need the equivalent of an IOLTA fund to support public dispute resolution work. We shouldn't have to fight to add an extra line to public infrastructure development projects again and again.

I hope that ACR or the Public Disputes Section decides to pursue this.

### **The importance of “advanced certification”**

For many years, I've argued that further credentialization in the dispute resolution field would be a mistake. Back then, we needed to let a thousand flowers bloom while the field was developing. (N.B. And, I don't agree with Peter Adler. We are not a discipline, we are a field, or a sub-field.)

By now, the field has developed. We need to push for advanced certification of professional neutrals in the environmental and public policy dispute resolution field – not to keep others out, but to ensure the world-at-large we know what we are doing. The USIECR roster continues to add people with limited experience as professional neutrals. I'm fine with that, but I would like to see a separate (advanced) category of neutrals (not trainers, not public engagement consultants) with substantial experience.

I hope that ACR and the EPP Section move forward with an advanced certification program that takes account of **years of service in the field (at least seven?) , accumulation of continuing education credits on an annual basis (which ACR-EPP would have to organize in the way that the law and other fields do), and peer recognition** (to be certified, advanced practitioners would have to submit letters from at least five others who already have that designation and who would be willing to attest to the performance of new applicants).

It won't be easy to work this out. And, there will be a tendency to use it to keep others out of the guild, but I think we should take the risk. I'm not proposing an exam of any kind (because I don't think a written exam begins to measure the relevant competence and experience). And, I don't think there should be a cap on the number of people who can be credentialed.

Perhaps USIECR (which keeps the most important national roster of professional neutrals) could be part of this.

### **Marketing the field**

Everybody's got a web page. Everybody's on Facebook. A few people are tweeting about this talk as I give it. Individual practitioners and dispute resolution companies know that they can't ignore social marketing. Yet, this doesn't help the world-at-large understand what our field does or why our services add value in most public sector settings.

Someone has got to take responsibility for marketing our sub-field on a continuing basis.

The legal profession has a frightening array of TV shows that does its work for them. We have nothing (and don't tell me about Fairly Legal – the TV show that aired last year and set back the mediation profession by several decades because it failed to take account of even the most basic ethical standards ). Anyway, I'm not arguing for a TV show. WPP-ACR and a private network of public and environmental dispute resolution practitioners can think of better ways to make an impact.

If the 500 or so people who think of themselves as environmental and public dispute resolvers in America paid \$100 a year into a fund, that \$50,000 could be used for a range of public relations efforts (like one minute mini-cases of successful public dispute resolution on national public radio every day). I know that some money has been spent to market the field in the past, but I'm not convinced we tapped the professional expertise of the same public relations companies that help major corporations have the impact they do!

All of us have to take some responsibility for helping to market the field (not just ourselves) if we want to grow the demand for our services over time.

**I want to end by re-emphasizing the point I made earlier. It is time for those of us who have been the most active in the field for two or three decades to step aside and unleash the entrepreneurial energy of the next generation of environmental and public dispute resolution professionals. Again, I'm not saying we can't help, but we should allow the next generation of public dispute resolution professionals to move the field in new directions.**